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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 8

WILLIAM SPINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (A–19–73) is reported at 382 F. 2d 871. The opinion of the panel (5 R. 1–20) is not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 31, 1967 (A. 17–18). A petition for rehearing was denied on September 12, 1967 (4 R. 72). Mr. Justice White extended the time for filing a petition for a writ of certiorari to November 11, 1967. The petition was filed on November 8, 1967, and was granted on March 4, 1968 (390 U.S. 942). On May 27, 1968, the order granting the petition was modi-

fied so as to limit review to the question of the constitutional validity of the search and seizure. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the United States Commissioner could reasonably find, on the basis of the affidavit submitted, that there was probable cause to issue a search warrant.

2. Whether the search warrant was properly executed.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for Issuance. A warrant may be issued under this rule to search for and seize any property

* * * * *

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; * * *

* * * * *

(c) Issuance and Contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant * * *. shall command the officer to search forthwith the person or place named for the property specified. * * *

* * * * *

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that * * * (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * *

* * * * *

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri of traveling in interstate commerce with intent to carry on an illegal gambling enterprise, and thereafter carrying on that enterprise, in violation of 18 U.S.C. 1952 (1 R. 1). He was sentenced to three years' imprisonment and fined $5,000. A panel of the court of appeals, one judge dissenting, reversed the conviction on the ground that evidence had been seized under a search warrant issued without probable cause. On the government's petition for rehearing *en banc*, the full court, two judges (the majority of the original panel) dissenting, held that there was no infirmity in either the issuance or the execution of the warrant.

(1) ***The information possessed by the FBI agents.***— In January 1965, F.B.I. agents who were present in an apartment at Pauline Place in St. Louis, Missouri, with permission of its occupants, overheard a bookmaking operation being conducted over telephones in a neighboring apartment used by petitioner. The overhearing, which was not assisted by any mechanical amplification, was apparently made possible by the absence of carpeting or rugs on the floor of the apartment used by petitioner (3 R. 32–33, 39–42, 45–47, 59–69, 72–82, 98–100). In early August 1965, an informant who had been furnishing a St. Louis F.B.I. agent accurate information on a weekly basis since 1963, told the agent that petitioner was conducting a gambling operation over telephone numbers WYdown 4–0136 and WYdown 4–0029 (A. 15–16, 11–12).

Thereafter F.B.I. agents conducted a surveillance of petitioner for approximately three weeks between August 6, 1965 and August 18, 1965. On the days they observed petitioner, they saw him depart in the late morning from his residence in East St. Louis, Illinois, and drive to St. Louis, Missouri (1 R. 58–59, 70–71), and, in the afternoon between 3:22 p.m. and 3:55 p.m., enter an apartment building at 1108 Indian Circle Drive. On one occasion they saw him enter the particular apartment, Apartment F, to which the two telephone numbers named by the informant were assigned (1 R. 74–75).[1]

(2) *The application for the search warrant.*—On Wednesday, August 18, F.B.I. Agent Bender, who had participated in both the investigation of Indian Circle Drive (1 R. 58–59) and the earlier investigation at Pauline Place (3 R. 137–138, 150–151, 100–102, 105), filed a sworn complaint before the United States Commissioner at St. Louis, Missouri, charging that petitioner had violated 18 U.S.C. 1952. He also filed an affidavit for a search warrant which stated that he had reason to believe that at Apartment F, 1108 Indian Circle Drive, certain property was being concealed, "namely bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, book and records of bets received,

[1] Telephone company records showed that these numbers were assigned to Mrs. Grace P. Hagen (1 R. 98). They also showed that these telephones and the telephones at petitioner's Pauline Place apartment were installed in the same month, November 1964 (3 R. 23–28, 114–115).

accounts, bookmaker's ledger sheets, two telephones," which had been used to violate 18 U.S.C. 1952 (A. 1-2). The supporting grounds to which he swore in the affidavit were as follows (A. 3-5):

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli [petitioner] is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers of WYdown 4-0029 and WYdown 4-0136." Telephone company records show that those two telephones are assigned to Grace P. Hagen in Apartment F at 1108 Indian Circle Drive. On August 6, 1965, and on three occasions in the following week (August 11, 12 and 13), between 11:16 a.m. and 12:07 p.m., F.B.I. agents saw petitioner drive his automobile from East St. Louis, Illinois, to St. Louis, Missouri. On the two latter occasions and once in the following week (August 16), between 3:22 and 3:45 p.m., the agents saw petitioner park his automobile on the parking lot used by residents of 1108 Indian Circle Drive and thereafter enter the apartment building. On August 13, at 3:55 p.m., an agent saw petitioner enter Apartment F. Petitioner was personally known to the affiant, and to other federal and local law enforcement agents, "as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

(3) *Execution of the warrant.*—The FBI agents arrived at the apartment building at approximately 5 p.m. on the same day that the warrants were issued,

and stationed themselves in an apartment across from Apartment F. When petitioner emerged from Apartment F about two hours later, they served him with the arrest warrant. Using a key found in a search of his person pursuant to the arrest, they unlocked the door to Apartment F. They then executed the search warrant and seized several items (A. 12–14; 3 R. 144–147, 173–181) described as gambling paraphernalia by an expert witness (3 R. 192–196, 199–217).

SUMMARY OF ARGUMENT

I

When an affidavit presents sufficient facts on which the commissioner can make an independent finding of probable cause to search, his decision to issue a warrant should not be set aside by the courts unless it is clearly unreasonable; doubtful cases should be resolved in favor of the commissioner's finding. The affidavit here stated that the FBI had been told by a reliable informant that petitioner, whom the agents knew to be a bookmaker, was conducting a handbook operation through the use of two specified telephone numbers. It also related that both telephone numbers were located in the same apartment, and that the agents had just completed a three-week surveillance of petitioner showing that he regularly went to that apartment in the afternoon hours. On the basis of those facts, the commissioner could reasonably believe that gambling paraphernalia used to violate 18 U.S.C. 1952 were located in the apartment.

Of course, the commissioner cannot accept "without question" the mere conclusion of an informant on whom the officers rely; he must be informed of some of the underlying circumstances on which he can determine whether the information is trustworthy. The affidavit here presented a substantial basis for crediting the hearsay information that petitioner was conducting a bookmaking operation through the use of two specified telephone numbers. The agent swore that the information had been furnished by a reliable informant. And the information evinced the informant's detailed knowledge of petitioner's bookmaking operation, thereby reducing the risk that it may have been the result of the informant's own mere suspicion.

Furthermore, unlike *Aguilar* v. *Texas*, 378 U.S. 108, and other cases relied on by petitioner, the hearsay information in this case was corroborated by the agent's own prior knowledge that petitioner was a bookmaker and by the results of the surveillance. The regular afternoon visits of a known bookmaker to an apartment which contained two telephones identified as being used to conduct a bookmaking operation was persuasive evidence of both the reliability of the informant and the specific allegation that petitioner was operating a handbook.

II

a. The two-hour delay between the time the agents arrived at the building and the time petitioner emerged from his apartment and was served with the warrants did not render the search unreasonable. The

requirement in Rule 41 of the Federal Rules of Criminal Procedure that the warrant be executed "forthwith" means that the agents must act promptly and without unreasonable delay. In this case, the agents could reasonably have believed that an attempt to enter the apartment might have defeated the purpose of the search by allowing petitioner to destroy some of the bookmaking paraphernalia, and that waiting until petitioner left the apartment would reduce the risk of forceful resistance or any question as to the sufficiency of the required announcement. In all events, there is no indication that petitioner was in any way prejudiced by the two-hour delay.

b. The purpose of the search was to seize all instrumentalities used in the commission of a federal offense. In order to accomplish that purpose, some of these instrumentalities must be described in generic terms, because the agents cannot predict all the specific items which may be used in a particular bookmaking operation. The term "bookmaking paraphernalia" provided sufficiently specific directions to the agents and did not create an undue risk that items not subject to seizure would be taken. All of the items seized by the agents had a logical connection with a bookmaking operation. And the absence of clothing, furniture, and personal articles in the apartment indicated that the apartment and all its contents were used solely for bookmaking purposes.

ARGUMENT

I

THE AFFIDAVIT PRESENTED SUFFICIENT FACTS TO SUPPORT THE COMMISSIONER'S FINDING THAT THERE WAS PROBABLE CAUSE TO ISSUE A SEARCH WARRANT

A. A COMMISSIONER'S FINDING OF PROBABLE CAUSE, BASED ON AN AFFIDAVIT CONTAINING FACTS ON WHICH HE CAN MAKE AN INDEPENDENT JUDGMENT OF THE GROUNDS FOR A WARRANT, SHOULD NOT BE SET ASIDE UNLESS CLEARLY UNREASONABLE

"Probable cause under the Fourth Amendment exists where the facts and circumstances within the [officer's] knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger* v. *New York*, 388 U.S. 41, 55. Except in certain carefully defined classes of cases, however, the police may not lawfully search private property, "notwithstanding facts unquestionably showing probable cause" (*Agnello* v. *United States*, 269 U.S. 20, 33), unless they first obtain a valid search warrant. *E.g.*, *Katz* v. *United States*, 389 U.S. 347, 356-359 & nn. 18-19; *Jones* v. *United States*, 357 U.S. 493, 497-499. As the Court said in *Johnson* v. *United States*, 333 U.S. 10, 14, the Fourth Amendment requires that the inferences from the facts asserted to show probable cause must be drawn "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

In order for the warrant to be an effective safeguard of individual privacy, the magistrate must make an informed and independent finding of probable cause; he "must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause." *Giordenello* v. *United States*, 357 U.S. 480, 486. Thus, where the only information presented to the magistrate was the officer's belief that certain merchandise was in a specified location, or the recital that such information had been received from an informant, this Court has held the warrants invalid because the magistrate "necessarily accepted 'without question'" the officer's, or the informant's, "belief" or "mere conclusion." *Aguilar* v. *Texas*, 378 U.S. 108, 112–115; *Giordenello* v. *United States*, *supra*, 357 U.S. at 486; *Nathanson* v. *United States*, 290 U.S. 41, 46–47; see *Beck* v. *Ohio*, 379 U.S. 89, 96–97.

However, when a warrant is issued on the basis of an affidavit presenting facts on which the magistrate can make an independent determination, his finding of probable cause should not be set aside merely because a court might have reached a different conclusion. See *Aguilar* v. *Texas*, *supra*, 378 U.S. at 111; *Jones* v. *United States*, 362 U.S. 257, 271. "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States* v. *Ventresca*, 380 U.S. 102, 109. Thus, a warrant may properly be issued on evidence of a

less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." *Jones* v. *United States, supra,* 362 U.S. at 270. And affidavits for search warrants "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States* v. *Ventresca, supra,* 380 U.S. at 108.

The preference to be accorded to warrants is in part a recognition that the act of applying for a warrant is an important step toward effectuating the constitutional protection against unreasonable searches and seizures. Given the inherent limitations of the judicial remedies for unconstitutional searches,[2] the general security of persons in their homes is far better served by rules which encourage resort to "antecedent justification." See *United States* v. *Lefkowitz,* 285 U.S. 452, 464.[3] As the Court said in *Ventresca,* "A grudging or

[2] See *Terry* v. *Ohio,* No. 67, O.T. 1967 (decided June 10, 1968), Slip. Op. at 10–11: "Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal. Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. * * *"

[3] As the Court stated in *Lefkowitz,* "Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." (285 U.S. at 464). See *Jones* v. *United States, supra,* 362 U.S. at 270.

The application for a warrant, moreover, invokes the judicial fact-finding process at a time when it cannot be influenced by the results of the search. As the Court said in *Beck* v. *Ohio,*

negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting" (380 U.S. at 108).

The preference also reflects the fact that the magistrate's determination of probable cause is itself an independent, and perhaps the most significant, element of the constitutional protection. See *McDonald* v. *United States*, 335 U.S. 451, 455. The courts cannot and do not examine every warrant, but those cases in which they do review a magistrate's findings significantly influence the entire process. Were the courts routinely to assume the function of passing *de novo* on grounds for issuing a warrant, it would tend to demoralize the magistrates, and to discredit the warrant process, without any compensating increase in the protection of individual rights. Both institutional considerations, therefore, and the less formalized burden and type of proof on the issue of probable cause—particularly the use of hearsay information[4]—demonstrate that a magistrate's finding of probable cause should not be set aside unless it is clearly unreasonable.[5]

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supra, "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after the event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment" (379 U.S. at 96).

[4] See pp. 18-20, *infra*.

[5] See *United States* v. *Haskins*, 345 F. 2d 111, 113 (C.A. 6).

II. THE FACTS IN THE AFFIDAVIT, ACCEPTING THE RELIABILITY OF THE HEARSAY INFORMATION, WERE SUFFICIENT TO ESTABLISH PROBABLE CAUSE

Since the affidavit in this case relied heavily on hearsay information, petitioner's challenge to the sufficiency of the affidavit presents two related questions: whether there was a substantial basis for crediting the hearsay as fact upon which a finding of probable cause could be made; and, if so, whether the facts were sufficient to support the commissioner's determination of probable cause. Compare *Giordenello v. United States*, *supra*, 357 U.S. at 485; *Jaben v. United States*, 381 U.S. 214, 223. Although the reliability of the hearsay is the more significant issue, petitioner alleges several deficiencies in the factual basis for the warrant which can be considered without reference to the hearsay question. In this section, therefore, we will discuss the reasonableness of the commissioner's finding of probable cause on the assumption that the hearsay is trustworthy.

The affidavit presented the following essential facts: FBI agents, who knew petitioner to be a bookmaker, received information from a reliable informant that petitioner "is operating a handbook and accepting wagers and disseminating wagering information" by means of two telephones with specified numbers. Telephone company records showed that both numbers were assigned to Apartment F in the apartment building at 1108 Indian Circle Drive in St. Louis. During

a three-week surveillance of petitioner, the agents saw him regularly, in the afternoon, go to the building at 1108 Indian Circle Drive; on one occasion, petitioner was observed to enter Apartment F, the apartment where the telephones specified by the informant were located.

The information that petitioner "is operating" a bookmaking enterprise,[4] together with petitioner's conduct observed by the agents, established probable cause for the issuance of the warrant. When petitioner was observed on one occasion to enter the apartment where the telephone numbers specified by the informant were located, the Commissioner could reasonably infer that petitioner's regular afternoon visits were to that apartment. The regular visits of a known bookmaker to an apartment which contained the two telephones identified as being used to conduct a book-

[4] Contrary to petitioner's assertion (Br. 18), it is immaterial that the affidavit did not allege that this information had been received by the affiant. In *Rugendorf* v. *United States*, 376 U.S. 528, 530-531, the Court upheld a warrant based on an affidavit in which much of the incriminating information had been supplied by informants to another FBI agent who in turn related it the affiant. As the Court stated in *United States* v. *Ventresca*, *supra*, 380 U.S. at 111, "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." It is equally reasonable to assume, as a general principle, that agents may be relied upon accurately to relate information which they have received from third persons. Indeed, unless separate affidavits are to be required from each agent participating in an investigation, the affiant must, as he did in this case, recount information which he has received from other agents.

making operation provided adequate reason to believe that petitioner was maintaining the handbook operation in that apartment. See *McCray* v. *Illinois*, 386 U.S. 300, 302–304; *Rugendorf* v. *United States*, 376 U.S. 528, 530–533; *Jones* v. *United States*, *supra*, 362 U.S. at 267–271 & n. 2; *Draper* v. *United States*, 358 U.S. 307, 309–310, 312–313; *Brinegar* v. *United States*, 338 U.S. 160, 162–163, 166–171, 176–177. Contrary to the suggestion in the dissent below (A. 64–68 & nn. 6, 9), it is not necessary that the affidavit allege that bookmaking paraphernalia had been observed in the apartment. See *Draper* v. *United States*, *supra*, *Brinegar* v. *United States*, *supra*, 338 U.S. at 169–171. The telephones themselves were subject to seizure as instrumentalities used in the commission of a federal offense, and it was entirely reasonable for the commissioner to infer that other paraphernalia commonly associated with bookmaking could also be found in the same apartment as the telephones.[7]

[7] Contrary to petitioner's contention (Br. 20–21), the affidavit is not defective because it fails to allege any specific overt act in furtherance of the gambling activity committed after the interstate travel, as required by 18 U.S.C. 1952. Although the affidavit must present facts to establish probable cause to believe that the property to be seized has been used in the commission of a federal offense, it is not necessary that the affidavit contain the specific allegations required of an indictment. On the basis of the affidavit, the commissioner could reasonably believe that petitioner's visits to the apartment after the interstate travel were for the purpose of carrying on his bookmaking operation in that apartment. That finding is sufficient. The fact that the original indictment in this case was dismissed in no way indicates that the commissioner, or the agents, were unaware of the requirements of 18 U.S.C. 1952.

Although the affidavit did not specify when the informant had advised the agents of petitioner's bookmaking operation, that omission does not, as petitioner contends (Br. 19-20), render the affidavit defective. Unlike *Rosencrans* v. *United States*, 356 F. 2d 310 (C.A. 1), relied on by petitioner, the affidavit here set out the dates of the agents' observations, showing that a surveillance was conducted during the three weeks immediately preceding the application for a warrant. The commissioner could reasonably infer that the agents were acting on current information when they initiated an extensive surveillance, particularly since the affidavit used the present tense. See *United States* v. *Conte*, 361 F. 2d 153, 156 (C.A. 2). Furthermore, assuming, as we do here, that the information was accurate when it was received by the agents, it provided reason to believe that the apartment where the telephones were located would be used by petitioner to carry on a bookmaking operation. When it was shown that immediately preceding the application for a warrant petitioner was making regular visits to that apartment, it was reasonable for the commissioner to infer that the purpose of petitioner's visits was to engage in bookmaking and that petitioner had not abandoned the handbook operation in favor of some other enterprise which also would cause him regularly to visit the apartment.

C. THE COMMISSIONER COULD REASONABLY BELIEVE THAT THE INFORMATION FURNISHED BY THE INFORMANT WAS RELIABLE

1. The principal question presented by petitioner's challenge to the affidavit is, in our view, whether the

information furnished by the informant was sufficiently trustworthy to provide a basis for the commissioner's finding of probable cause. In *Jones* v. *United States*, *supra*, 362 U.S. at 269, the Court held that a valid warrant may be issued on the basis of an affidavit which rested entirely on hearsay information, "so long as a substantial basis for crediting the hearsay is presented." See *Aguilar* v. *Texas*, *supra*, 378 U.S. at 114. But where the affidavit indicates the underlying circumstances supporting the affiant's or the informant's belief, "where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should validate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States* v. *Ventresca*, *supra*, 380 U.S. at 109.

NOT INVALIDATE

The policies which underlie the "preference to be accorded to warrants" are particularly clear when the issue involves the reasonableness of a commissioner's belief in the accuracy of hearsay information. As the Court said in *Ventresca* (380 U.S. at 108), affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Without the benefit of an adversary proceeding, or the assistance of a lawyer to draw from him relevant information and to guide him in the manner and sufficiency of its presentation, the police officer cannot be expected to produce a document which would pass the elaborate tests which lawyers may devise to establish the accuracy of hearsay.

A continued course of dealings with an informant

whom the officer has grown instinctively to trust often may be summarized, as in the present case, in a conclusory statement. In other instances, the failure to recite the source of the informant's knowledge may not appear to the officer to require an explanation, either because of the nature of the informant's operations and the fact that he had previously supplied information of a similar character which proved accurate, or, as here, because the officer has satisfied himself by his own independent investigation that the information is accurate. The obtaining of search warrants would be substantially discouraged by requirements of specificity which police officers realistically cannot be expected to satisfy.

Moreover, there are practical limitations on the extent to which an affidavit can demonstrate the reliability of the hearsay information it contains. A police officer, and even a lawyer, cannot be expected to set forth in the affidavit all of the facts that would be developed in a judicial inquiry as to the reliability of hearsay.[8] If the test of the validity of a warrant was whether the affidavit answered all the questions which might occur to a court on review, few warrants would be sustained, and the police would be effectively deprived of the use of informants to supply the facts necessary to obtain a warrant.[9]

The Constitution does not require such a test. Probable cause, as the Court said in *Brinegar* v. *United States*, 338 U.S. 160, 175, "deal[s] with probabil-

[8] Compare *Jaben* v. *United States*, 381 U.S. 214, 223–225.

[9] See *Lewis* v. *United States*, 385 U.S. 206, 210.

ities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." The constitutional safeguard, therefore, may be satisfied by a finding that, on all the facts in the affidavit, the commissioner could reasonably believe that the hearsay information was trustworthy. The teaching of *Ventresca* is that "requirements of elaborate specificity" are not to be applied to the affidavit; its factual allegations need not satisfy each component of a rigid formula. As long as the affidavit provides a substantial basis for crediting the hearsay, the warrant should not be invalidated because the affidavit fails to supply other information which also would be relevant to the issue.

2. Petitioner's argument rests primarily on *Aguilar* v. *Texas*, *supra*, and particularly on the following statement (378 U.S. at 114):

> Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States*, 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States*, 376 U.S. 528, was "credible" or his information "reliable." * * *"

The affidavit in *Aguilar* recited only that the affiants "have received reliable information from a credible

person and do believe that heroin, marijuana, barbituates and other narcotics" were being kept for sale at a particular house (*id.* at 109). The Court held that a warrant based on that information, like the warrants in *Nathanson* and *Giordenello*, manifestly had not been issued upon the magistrate's independent determination of probable cause: "He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion' " (*id.* at 114).[10] The affidavit in the present case, however, read fairly as a whole (see *United States* v. *Ventresca, supra*, 380 U.S. at 111), provided sufficient facts upon which the commissioner could make an independent finding that the informant's information was trustworthy. The intrinsic facts of the hearsay information, corroborated by the agents' own knowledge and the results of their surveillance, provided a "substantial basis" for crediting the hearsay.

The affidavit presented the hearsay information in the following statement: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4–0029 and WYdown 4–0136" (A. 5). Although those facts may not be sufficient, by themselves, to establish the

[10] The Court's opinion in *Aguilar* apparently assumes that the informant had told the officers that narcotics could be found at that house. It is not entirely clear from the affidavit in *Aguilar*, however, exactly what information was given to the officers. Compare *Beck* v. *Ohio*, *supra*, 379 U.S. at 97.

reliability of the hearsay information, they do support the reasonableness of the commissioner's belief that the information was trustworthy. The affidavit stated that the information had been furnished by a "confidential reliable" informant. Interpreting those words in a "commonsense and realistic fashion" (*Ventresca, supra*, 380 U.S. at 108), the commissioner reasonably could infer that a sworn statement by a federal agent that an informant was reliable meant that the informant had provided accurate information in the past. Indeed, that is precisely what a "confidential reliable" informant means in this context.

In *Rugendorf* v. *United States*, 376 U.S. 528, 530, the Court upheld a warrant which was issued solely on the basis of hearsay information furnished by three persons, who were described respectively as "a confidential informant who had furnished reliable information in the past," "a confidential informant whom the FBI had found to be reliable," and "another confidential informant who had furnished reliable information to the [FBI] in the past." And in *Aguilar*, the Court cited, as satisfying the standards announced in that case, the affidavit in *Jones*, which stated only that "the source of information * * * has given information to the [affiant] on previous occasion and which was correct" (378 U.S. at 114-115 n. 5; 362 U.S. at 267-268 n. 2).[11] In this case, an argument based on

[11] The Court's approval in *Aguilar* of the *Jones* affidavit, moreover, indicates that in a case where the affidavit is based entirely on hearsay information, the underlying facts sufficient to establish the general credibility of the informant may be satisfied by a statement that the informant had furnished correct information on one previous occasion.

the difference between "a reliable informant" and "an informant who has provided reliable information in the past" invokes the "hypertechnicalities" which this Court criticized in *Ventresca*. But even if that difference is material, the commissioner was at least entitled to give some weight to the fact that the FBI thought the informant sufficiently reliable to conduct a three-week surveillance, involving several agents, to determine whether petitioner's activities involved any violation of federal law.

Furthermore, unlike the affidavits in *Aguilar* and *Riggan* v. *Virginia*, 384 U.S. 152,[1] and the testimony in *Beck* v. *Ohio*, *supra*, the affidavit here recited that the informant had given specific information as to the type of petitioner's gambling operation (a handbook), the way in which it was carried out (by telephone), and the precise telephone numbers which were used. The specificity of information is an important factor in assessing its reliability; it is a measure of the informant's knowledge of the critical fact—here, petitioner's gambling operation—in issue on the application for a warrant. The details given bespoke an actual knowledge of petitioner's business. Their presence significantly reduced the risk that the information was the product of the informant's own mere suspicion or belief that petitioner was engaged in a gambling

[1] The affidavit in *Riggan* stated only that the application for a warrant was based upon "[p]ersonal observation of the premises and information from sources believed by the police department to be reliable" (*Riggan* v. *Commonwealth*, 141 S.E. 2d 298, 299 n. 1 (Va. 1965)). There is no indication that any additional facts were presented to the issuing magistrate.

operation. See *Aguilar* v. *Texas*, *supra*, 378 U.S. at 113-114 & n. 4.

Relying on the Court's discussion in *Aguilar*, petitioner contends that the information cannot be considered trustworthy because the affidavit did not state that the information was based on the informer's personal participation in or observation of the bookmaking activity (Br. 19). *Aguilar* does not necessarily establish, however, that information which does not result from an informant's own observation is to be considered inherently unreliable; a "substantial basis" for crediting such information may exist where an informant previously has furnished accurate information which, perhaps because of his own circumstances, he must gather from other sources trusted by him. In all events, the affidavit here, unlike that in *Aguilar*, presented the agent's own prior knowledge and that obtained by the surveillance of petitioner to corroborate the hearsay information. As the Court stated in *Aguilar* itself, those facts materially distinguish the present case from cases in which the affidavit rests solely on hearsay (378 U.S. at 109 n. 1):

> The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. * * * If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

The affidavit stated that petitioner was known to be a bookmaker by the affiant and other federal agents.

The fact that petitioner was a known bookmaker, as the Court said in *Jones*, "made the charge against him much less subject to scepticism than would be such a charge against one without such a history" (362 U.S. at 271). Furthermore, the affidavit detailed the results of the agents' own investigation. Their inquiries of the telephone company showed that the two telephone numbers specified by the informant were both in operation and that both numbers were assigned to the same apartment. And their three-week surveillance of petitioner's activities showed that he regularly visited that apartment in the afternoon hours. While regular visits to an apartment might not, in most cases, suggest any illegal activity, the agent's knowledge that petitioner was a bookmaker supports the reasonableness of the inference that his visits were in furtherance of the bookmaking operation, as the informant had advised. See *Brinegar* v. *United States*, *supra*, 338 U.S. at 169–170; *Husty* v. *United States*, 282 U.S. 694, 700–701.

The fact that a suspect engages in conduct which an informant advised the agents he would perform is persuasive evidence that the informant's information is reliable. *Draper* v. *United States*, 358 U.S. 307; see *McCray* v. *Illinois*, 386 U.S. 300, 304; *Scher* v. *United States*, 305 U.S. 251, compare *Beck* v. *Ohio*, 379 U.S. 89, 94. It is not necessary that the conduct observed by the agents itself indicate illegal activity. In cases involving arrests without a warrant, where more compelling evidence would be required than in the present case, the Court has held that the observation of "mat-

ters in themselves totally innocuous" (*Jones* v. *United States*, *supra*, 362 U.S. at 269-270) is sufficient corroboration to establish the reliability of the incriminating information.

In *Scher* v. *United States*, *supra*, federal officers received confidential information "thought to be reliable" that a specific car would transport liquor from a specific dwelling. Thereafter, the officers observed movements which coincided with that information but which would not be sufficient, without the informer's tip, to establish probable cause. The Court upheld a search incident to a warrantless arrest. In *Draper*, an agent made an arrest without a warrant on the basis of information furnished by a reliable informant that Draper was selling narcotics and would return by train with narcotics in his possession. The informant also gave a physical description of Draper and said that he would be carrying a tan zipper bag. Based on this information, the agent arrested the defendant shortly after he alighted from the train. This Court held that there was probable cause for the arrest, noting that the agent had verified every facet of the information except whether the defendant had the narcotics in his possession (358 U.S. at 313).

And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

More recently, in *McCray*, the Court held there was probable cause to arrest without a warrant where the police had been told by an unnamed reliable informant that the defendant had narcotics on his person and could be found at a particular place at a particular time.

Indeed, the nature of the information furnished to the agents in this case allowed more reliable corroboration than the information supplied in the preceding cases. Unlike the isolated transactions described by the informants in *Draper*, *Scher*, and *McCray*, illegal bookmaking is a business activity, conducted on a regular basis, frequently through the use of multiple telephones, and requiring a regular base of operation. The informant here did not merely alert the agents to a single visit by petitioner to an apartment. The conduct observed by the agents substantially reduced the risk that the apartment could have been subjected to an erroneous search merely because petitioner happened to visit there for a lawful purpose. Regular visits by a known bookmaker to an apartment with multiple telephones itself creates a suspicion that the apartment is being used for gambling purposes. When it was shown that the telephone numbers specified by the informant were located in that apartment, the Commissioner could reasonably find that petitioner's conduct both confirmed the reliability of the information and corroborated the incriminating statement that petitioner was operating a handbook.

II

THE SEARCH WARRANT WAS PROPERLY EXECUTED

A. THE TWO-HOUR DELAY IN EXECUTING THE WARRANT WAS REASONABLE

The agents delayed execution of both the search and arrest warrants until petitioner emerged from Apartment F, about two hours after they arrived at the building. During that period, they waited in a nearby apartment where they could observe the door to Apartment F (A. 12–14). Petitioner contends that since the agents made no effort "to enter the premises either by force or invitation," they violated both the requirement of Rule 41, F.R. Crim. P., and the command of the warrant itself, that the warrant be executed "forthwith."

Whether a search has been conducted "forthwith" depends upon the particular circumstances. Rule 41 specifies only a maximum period of ten days within which the warrant must be executed, and a delay of two hours after the agents arrived in the building where the apartment to be searched was located is not inconsistent with the Rule. See *Benton* v. *United States*, 70 F. 2d 24 (C.A. 4), certiorari denied, 292 U.S. 642 (delay of 1 day); *Mitchell* v. *United States*, 258 F. 2d 435 (C.A.D.C.) (delay of 5 days). The term "forthwith" is a direction to act promptly, within a reasonable time. See *Seymour* v. *United States*, 177 F. 2d 732 (C.A.D.C.).

There are several valid reasons why the agents might reasonably have decided to delay execution of the warrants until petitioner left the apartment. The agents might have wanted to eliminate any question as to the sufficiency of the announcement required

under 18 U.S.C. 3109, see *Sabbath* v. *United States* (No. 898, O.T., 1967, decided June 3, 1968), or to avoid any possibility that force would have been required to enter the apartment. They may have believed that serving the warrants in the hallway would reduce the risk of forceful resistance by petitioner. Perhaps the most likely reason for the delay was stated by the court below: "[H]ad the officers knocked at the door the evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment" (A. 39). Since the agents had a duty to seize the items named in the warrant, the concern that an attempt to enter the apartment would have resulted in the destruction of some of these items would be ample justification for the delay.

The requirement that officers execute a warrant "forthwith" serves several aims. It insures that the arrest or search is made for the purpose for which the warrant was issued. It protects individuals against unnecessary police surveillance and against the needless invasion of their premises to search for property which may have been removed or destroyed since the warrant was issued. The brief delay in the execution of the search warrant in this case contravened none of those policies and, as we have shown, was justified by several considerations.

B. THE WARRANT ADEQUATELY DESCRIBED THE PROPERTY TO BE SEIZED, AND COVERED THE ITEMS TAKEN

The search warrant authorized the seizure of "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, base-

ball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones" (A. 6–7). Among the items seized were the following, which petitioner contends do not come within any of the above categories: an adding machine, pencil sharpener, blank deposit slips, $22.00 in currency, a radio, a pair of eyeglasses, a watch, graph paper, four pens, two pencils, the lease for the premises, and five telephones (instead of two) (A. 8–11). At the time the agents executed the warrant, there was *no* clothing in the closets, no toilet articles in the bathroom, and only a daybed or couch in one of two bedrooms (3 R. 171–172). The lease was found on top of the refrigerator (3 R. 179). The other items, with the exception of the telephones and adding machine, were found on top of a table (3 R. 173–180). With the exception of the blank deposit slips and the graph paper, all of the items which petitioner contests were introduced in evidence by the government. The eyeglasses and the wrist watch, however, were offered in evidence only after petitioner brought out before the jury that they were seized but had not been introduced (3 R. 186–187).

In authorizing the seizure of "bookmaking paraphernalia" in addition to the other items enumerated, the search warrant did not violate the requirement of specificity. Where the object of a search, as here, is to confiscate all property which is subject to seizure as contraband by reason of its use in an illegal activity, some of that property must be described in generic terms. Otherwise, all of the instrumentalities of a

bookmaking enterprise could not be removed under a warrant unless the officer could anticipate each item of property used in the operation. Such minute description, even if possible, is not necessary to protect the right of privacy guaranteed by the Fourth Amendment. See *Berger* v. *New York*, 388 U.S. 41, 98–100 (Harlan, J., dissenting); *Warden* v. *Hayden*, 387 U.S. 294. Nor does a term describing gambling property by its use convert a specific warrant into a general warrant.

The subject of the search warrant here is totally unlike the invalid warrant which authorized the seizure of literary material in *Stanford* v. *Texas*, 379 U.S. 476, on which petitioner relies. The protection of First Amendment rights, of course, calls for more "sensitive tools". See *Speiser* v. *Randall*, 357 U.S. 513, 525. As this Court noted in *Marcus* v. *Search Warrant*, 367 U.S. 717, 731, where the warrant directed the seizure of obscene literature, "The authority to the police officers under the warrants issued in this case * * * poses problems not raised by * * * warrants to seize 'gambling implements' and "all intoxicating liquors'."

When the agents entered the apartment in this case, it was immediately apparent, from the absence of furniture, clothing, and personal articles, that the apartment and its contents were being used only for the illegal bookmaking activity. The adding machine, money, telephones, writing materials, radio, and watch were obviously related to the taking and recording of bets, and thus are fairly comprehended by the term

No. 8.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

WILLIAM SPINELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR PETITIONER.

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Statutes and Rules Cited.

Miscellaneous Cited.

"bookmaking paraphernalia". The lease in the name of Grace Hagen also was a material instrumentality in the commission of the offense because it is frequently necessary to use a false name to conceal the identitty of the true occupant of a gambling establishment. Even the eyeglasses were presumably used by petitioner in the course of his bookmaking operation, but the government did not introduce this item into evidence until the petitioner had raised a question about it. In all events, the seizure of that one item would not render the entire search and seizure unreasonable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

This cause was originally argued before a division of the United States Court of Appeals for the Eighth Circuit. On February 1, 1967, the division rendered its decision (R. V 21),[1] reversing petitioner's conviction, in a

[1] The certified transcript of the record filed by the Clerk of the United States Court of Appeals for the Eighth Circuit consists of five volumes. References to the record (R.) in this Brief shall be to the volume (in Roman numeral) and the page (in Arabic numeral). References to the Appendix (A.) shall be to the page (in Arabic numeral).

majority opinion written by Circuit Judge Heaney and concurred in by Circuit Judge Van Oosterhout (R. V 1-11). A dissenting opinion was written by Circuit Judge Gibson (R. V 12-20). These opinions have not been officially reported and were withdrawn on July 31, 1967 (R. V 22).

The Government sought and was granted a rehearing before the Court en banc (R. IV 1). After reargument before the entire Court, a decision (A. 17-18, R. IV 61) was rendered on July 31, 1967, affirming petitioner's conviction. The majority opinion was written by Circuit Judge Gibson for six members of the Court (A. 19-56, R. IV 2-42). A dissenting opinion was written by Circuit Judge Heaney in which Circuit Judge Van Oosterhout concurred (A. 56-73, R. IV 42-60). These opinions are officially reported at 382 F. 2d 871.

Certain orders were entered by District Judge Harper in ruling on various pre-trial motions filed by petitioner. These orders were not officially reported (A. 16-17, R. I 87-88, 89, 94).

JURISDICTION.

The judgment of the United States Court of Appeals was entered on July 31, 1967 (A. 17-18, R. IV 61). A timely petition for rehearing filed by petitioner (R. IV 62-71) was denied on September 12, 1967 (R. IV 72). The petition for writ of certiorari, presenting eleven different questions, was filed on November 8, 1967, and was granted as to all questions on March 4, 1968. 390 U. S. 942. Thereafter on May 27, 1968, this Court modified the order of March 4, 1968, "so as to limit the review in this Court to the constitutional validity of the search and seizure." ... U. S. ....

The jurisdiction of this Court rests on 28 U. S. C., § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT INVOLVED.

The constitutional provisions, statutes, and rules of court involved are the following:

Amendments to Constitution of the United States:

IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V.

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

Statute of the United States:

18 U. S. Code, § 1952 (75 Stat. 498, amended 79 Stat. 212). **Interstate and foreign travel or transportation in aid of racketeering enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

Federal Rules of Criminal Procedure:

Rule 41. **Search and seizure**.

(c) **Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may

direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) **Execution and Return With Inventory.** The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) **Motion for Return of Property and to Suppress Evidence.** A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on

any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

QUESTIONS PRESENTED.

I.

Whether an affidavit of an F. B. I. agent in support of a search warrant and based upon information furnished by an unidentified informant is consistent with the Fourth Amendment to the Constitution of the United States and provides probable cause for issuance of the search warrant, even though it does not allege:

A. underlying circumstances corroborating the information furnished by the informant, or

B. proof of the credibility of the alleged informant himself with facts concerning his prior use and reliability, or

C. facts showing that the informant spoke with personal knowledge, or

D. the time when the informant learned his information and when he conveyed it to a colleague of the affiant, or

E. all of the essential elements of the alleged offense, or

F. facts as to the commission of a federal offense.

II.

Whether an officer, armed with a search warrant commanding him to search premises forthwith, may, after arriving at the premises to be searched, delay its execution for a period of time, without explanation as to the reason for such delay and, if the officer may delay, whether the officer must satisfactorily explain the reason for such delay or whether the person challenging the search must prove prejudice resulting from the delay.

III.

Whether the term "bookmaking paraphernalia" in a search warrant is sufficiently specific and particular to justify the seizure of an adding machine, pencil sharpener, blank bank deposit slips, radio, currency, glasses, watch, paper, pens, pencils, apartment lease, and telephones.

STATEMENT OF THE CASE.

Petitioner was tried by a jury and convicted in the United States District Court for the Eastern District of Missouri. He was sentenced to imprisonment for three years and a fine of $5,000.00 (R. III 325). The indictment (R. I 1) charged that petitioner, between August 6, 1965 and August 18, 1965, traveled in interstate commerce from Illinois to Missouri with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, a business enterprise involving gambling in violation of Section 563.360 of the Missouri Revised Statutes, and that he thereafter performed and attempted to perform acts to promote, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity, all in violation of Title 18, United States Code, Section 1952.

A search warrant (A. 6-7, R II) issued by the United States Commissioner on August 18, 1965, authorized a search of Apartment F at 1108 Indian Circle Drive, Olivette, Missouri, and the seizure of property described as "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." An affidavit for the search warrant (A. 1-2, R. II) was executed by F. B. I. Special Agent Bender to which he attached his separate typed affidavit (A. 3-5, R. II).

The typed affidavit recited that petitioner had been seen on several occasions between August 6 and August 16, 1965, crossing bridges from Illinois to Missouri and on some occasions during that time at or in the vicinity of the subject apartment, that telephone company records reflected that there were two telephones in the apartment

under the name of Grace P. Hagen and bearing numbers WYdown 4-0029 and WYdown 4-0136, and that petitioner was known to law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers. The affidavit concluded: "The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

After receiving the search warrant, F. B. I. agents arrived at the apartment building at approximately 4:55 P. M. on August 18, and waited in Apartment H (across the hall from Apartment F) until 7:05 P. M. No effort was made to enter the premises or to arrest petitioner between 4:55 and 7:05 P. M. (A. 14, R. I 55, R. III 155-166). At 7:05 petitioner left Apartment F, and the agents emerged from Apartment H and arrested him (A. 12-13, R. I 51, 62-64, R. III 144-145). A key taken from his pocket opened the door to Apartment F (R. I 57, R. III 146-147). Petitioner was taken downtown and booked while other officers remained on the premises and conducted a search (A. 12, R. I 49, R. III 147).

The items seized in the search consisted of pieces of paper, written notations, adding machine, pencil sharpener, radio, publications pertaining to baseball games, money, glasses, wrist watch, pens and pencils, lease, and five telephones. A list of the seized items was included in the return to the search warrant (A. 8-11, R. II).

The original indictment against petitioner was dismissed by the Government because it failed to allege any overt acts after the alleged travel in interstate commerce (R. II). After a new indictment, petitioner filed a motion to suppress evidence (R. I 12-13). Several agents testified at

a pre-trial hearing (R. I 37-78), after which the District Court overruled the motion to suppress evidence on the ground petitioner had no standing to protest the search (A. 16-17, R. I 88).

At the trial, evidence was admitted, over petitioner's objection, concerning petitioner's alleged participation in a handbook operation at another location seven or eight months prior to the time alleged in the indictment. With reference to the alleged handbook operation at 1108 Indian Circle Drive, the only evidence was the items seized on the search, which an F. B. I. Agent was permitted, over petitioner's objection, to identify as part of a handbook operation; there was no evidence of any bets placed with petitioner or of conduct of petitioner, other than his travels across the state line and his presence at or near the premises.

Petitioner appealed his conviction to the United States Court of Appeals for the Eighth Circuit (R. I 112-113).

On February 1, 1967, a decision was rendered reversing petitioner's conviction and remanding the proceedings to the District Court (R. V 21). Judge Heaney, with the concurrence of Judge Van Oosterhout, held that the affidavit on which the search warrant was issued did not provide the basis for probable cause (R. V 1-11). Judge Gibson dissented (R. V 12-20).

The Government filed a petition for rehearing en banc or in the alternative for a rehearing, which was granted and a rehearing was ordered before the Court en banc (R. IV 1). On July 31, 1967, the Court of Appeals en banc, by a 6-2 decision, affirmed the conviction (A. 17-18, R. IV 61) and withdrew the former opinion (R. V 22). The majority opinion written by Judge Gibson ruled adversely to petitioner on a jurisdictional question as to the right of the Government to petition for rehearing and on all of peti-

tioner's other arguments (A. 19-56, R. IV 2-42). Judge Heaney, with the concurrence of Judge Van Oosterhout, wrote a dissenting opinion on the search question (A. 56-73, R. IV 42-60). (All of the opinions agreed that petitioner had standing to object to the search.)

Thereafter, petitioner's petition for rehearing (R. IV 62-71) was denied (R. IV 72). This petition for certiorari was duly filed on November 8, 1967, granted on March 4, 1968 (390 U. S. 942), and modified on May 27, 1968 (... U. S. ...).

SUMMARY OF ARGUMENT.

In accordance with the order of May 27, 1968, modifying the order granting the petition for certiorari, the review in this Court (and the argument in this Brief) is limited to the question of the constitutional validity of the search and seizure. As such, three of the questions originally presented are now in issue:

1. the validity of the search warrant;

2. the manner of its execution; and

3. the propriety of the seizure.

The search and seizure was constitutionally improper from start to finish, and the evidence seized should have been suppressed.

1. The search warrant was invalid because the affidavit in support thereof did not provide probable cause for its issuance. There were no underlying circumstances to corroborate the information of the alleged informant, whose credibility was not established. There was nothing presented to the Commissioner to show that the informant was a credible person or that his information was reliable. The affidavit was not based upon personal knowledge as to the information contained. It gave no time references as to the alleged information or when the informant learned of it or when he communicated such information to the affiant. The affidavit failed to allege all of the essential elements of a federal offense. For all of these reasons, the affidavit was defective and the search warrant was invalid.

2. Officers in possession of a search warrant requiring that it be executed forthwith do not have arbitrary authority to withhold its execution to some later time deemed by them, for some unexplained reason, to be more propitious

for its execution. No discretion is vested in the officer as to when he may execute the search warrant. If, however, it should be held that he does have discretion in the manner of execution, then the person complaining of the search ought not to have the burden of showing that he was prejudiced thereby, but the burden should be on the Government to prove harmless error.

3. A search warrant must specifically describe the property to be seized. If the term "gambling paraphernalia" includes items such as an adding machine, pencil sharpener, radio, money, glasses, watch, paper, pens and pencils, a lease and telephones, then it is too broad and vague and constitutes a general warrant condemned by the law.

ARGUMENT.

I.

The Affidavit in Support of the Search Warrant Did Not Provide Probable Cause for Issuance of the Search Warrant.

On August 18, 1965, the United States Commissioner issued a search warrant upon application of Robert L. Bender, Special Agent of the Federal Bureau of Investigation (A. 6-7, R. II). The printed form affidavit of Agent Bender stated that "he has reason to believe that" on the subject premises "there is now being concealed certain property . . . which are designed and intended for use, and which are or have been used as the means of committing a criminal offense, namely, violation of Section 1952, Title 18, United States Code" (A. 1-2, R. II). To this affidavit was attached a separate typed affidavit of Agent Bender, entitled "Affidavit in Support of Search Warrant" (A. 3-5, R. II).

This affidavit stated that on various designated dates between August 6 and August 16, 1965, petitioner was observed by the affiant or other agents crossing bridges from East St. Louis, Illinois, to St. Louis, Missouri, and on some occasions parking near or entering the subject premises; that telephone company records "reflect that there are two telephones located in" the subject premises under the name of Grace P. Hagen with numbers WYdown 4-0029 and WYdown 4-0136; that petitioner "is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers."

The affidavit concluded: "The Federal Bureau of Investigation has been informed by a confidential reliable

informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136" (A. 5).

The validity of the search warrant must be determined by the sufficiency of this affidavit. We believe the affidavit did not provide sufficient probable cause for the issuance of the search warrant.

A. **No underlying circumstances.**

The affidavit was insufficient because it failed to allege any underlying circumstances to corroborate the information allegedly furnished by the confidential informant. There was nothing presented to the Commissioner from which he could conclude that appellant was engaged in unlawful activities or that there was probable cause for the issuance of the search warrant. Interstate travel, visiting the apartment, two telephones, and a reputation do not constitute illegal conduct. The confidential information that petitioner "is operating a handbook and accepting wagers and disseminating wagering information" was uncorroborated. We believe the majority opinion below is in error in finding reasonable cause without such corroboration.

If the information in this affidavit is sufficient, then anyone with two telephones, or for that matter with one telephone, could be subjected to searches because he might be visited by an individual having a gambler's reputation, without any indication of wrongdoing other than the alleged word of an unidentified and uncorroborated informant. The Fourth Amendment commands greater protection to our citizenry. As said in **Aguilar v. Texas**, 378 U. S. 108, 114:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal

observations of the affiant, **Jones v. United States**, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were . . ." (or here, that William Spinelli was operating a handbook, etc.).

In the Aguilar case, the affidavit stated that the officers had received reliable information from a credible person that narcotics were being stored. The language of the affidavit is almost identical to that in the instant affidavit. The language of the Aguilar opinion is equally applicable to the present case (l. c. 113-114):

> "The vice in the present affidavit is at least as great as in **Nathanson** and **Giordenello**. Here the 'mere conclusion' that petitioner possessed narcotics (was operating a handbook) was not even that of the affiant himself, it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein', it does not even contain an 'affirmative allegation' that the affiant's unidentified source 'spoke with personal knowledge.' For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession (that petitioner was operating a handbook). The magistrate here certainly could not 'judge for himself the persuasiveness of the facts relied on . . . to show possible cause.' He necessarily accepted 'without question' the informant's 'suspicion,' 'belief' or 'mere conclusion.'"

Compare the detail contained in the affidavit in **United States v. Ventresca**, 380 U. S. 102, in which the search warrant was sustained.

In **Riggan v. Virginia**, 384 U. S. 152, this Court in a per curiam order reversed the lower court judgment on the

authority of the Aguilar case. The dissenting opinion indicated the contents of the affidavit, which had far more detail than the affidavit in the present case.

We believe that the controlling rule of these cases is that if hearsay allegations originating from an unidentified informant are relied upon in an affidavit for a search warrant, the underlying circumstances supporting the allegations must be set forth, or the affidavit will be insufficient to show probable cause. The majority opinion below failed to follow this rule.

B. **No credibility.**

As stated in the Aguilar case, supra, at 114-115:

> "... the magistrate must be informed of ... some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see **Rugendorf v. United States**, 376 U. S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' **Giordenello v. United States**, supra, at 486; **Johnson v. United States**, supra, at 14, or as in this case, by an unidentified informant."

Whether the requirements of a credible informant and reliable information are conjunctive or disjunctive is immaterial in the instant case because there is neither. As pointed out in part A hereof, the affidavit contained nothing to corroborate the information and to show that it was reliable. There was no specific detail furnished by the alleged informant and repeated in the affidavit concerning the operation of the alleged handbook. It was, at the most, an unsupported conclusion.

With reference to the credibility of the informant, there were no allegations to indicate any prior use of this informant. The affidavit stated that "the Federal Bureau of Investigation has been informed by a confidential reliable informant" of certain information. (It is significant that the agent who made the affidavit did not even allege that he had received this information—only that the F. B. I. had been informed. In fact, the testimony at the pre-trial hearing on the motion to suppress evidence (A. 11, R. I 47, 67) indicated that this information was conveyed to the affiant by another agent who supposedly obtained it from the unidentified informant.)

Without pointing out any underlying circumstances to corroborate the informant's credibility, the majority opinion below (A. 29, 32, R. IV 12, 16) draws comfort from its statement that the hearsay information came from one "sworn to be reliable." To say it is reliable does not make it so. There was nothing in the affidavit, nor anything presented to the Commissioner,[2] which proved the credibility of the informant, as required by the Aguilar and subsequent cases. There was nothing similar to the prior use of the informant which was found sufficient in **McCray v. Illinois**, 386 U. S. 300, and **United States ex rel. Rogers v. Warden**, 2 Cir., 381 F. 2d 209.

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[2] The question of probable cause must necessarily be determined by the contents of the affidavit. Whether a United States Commissioner may receive oral testimony in addition to the affidavit (See **Gillespie v. United States**, 8 Cir., 368 F. 2d 1; cf. **Aguilar v. Texas**, 378 U. S. 108, fn. 1), need not be decided in this case, because there was no evidence that the Commissioner here considered anything other than the affidavit of Agent Bender. Bender testified that he saw petitioner at the bridge at 12:15 P. M. on August 18, 1965, and then went back to his office and prepared the affidavit for the search warrant and other documents which were presented to the Commissioner (R. I 59). Agent Bradley testified that he received the search warrant between one and two o'clock from the Commissioner (R. I 62). Obviously there was not much time for the Commissioner to conduct any sort of a hearing.

C. **No personal knowledge.**

As previously noted, the Aguilar case, quoting from **Giordenello v. United States**, 357 U. S. 480, 486, stated that the affidavit not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," but it did not even contain an affirmative allegation that the unidentified source spoke with personal knowledge. This deficiency is similarly apparent in the affidavit in this case, but the majority opinion below is silent as to this omission. There is nothing to indicate that the informant's conclusion as to petitioner's alleged illegal activity was based on the informant's personal knowledge, such as, by placing a wager, or personally receiving wagering information, or actually seeing the handbook in operation. And, of course, the affiant Bender had no such personal knowledge; in fact, he himself did not even receive the information directly from the informant. For all that appears from the affidavit, the informant could have repeated uncorroborated hearsay information which he could have received from someone not reliable.

D. **No time.**

The affidavit did not allege the time of the occurrence of the information furnished by the informant, or the time that he learned of it, or the time of receipt of such information by the Federal Bureau of Investigation. Here again the majority opinion is silent as to this omission. In **Rosencranz v. United States**, 1 Cir., 356 F. 2d 310, it was held that the use of the present tense was not sufficient to overcome the deficiency in failing to aver the time when the informant became aware of the law violation or the time when he conveyed this information to the affiant.

The omission of time is all the more significant in a proceeding involving Section 1952 of Title 18, U. S. C.,

because the overt act must occur after the travel. (As originally introduced, Section 1952 did not require a subsequent overt act, but Congress amended the law prior to adoption to require such an overt act. See sections relating to purposes of amendments in Senate Judiciary Committee Report No. 644, dated July 27, 1961, and House Judiciary Committee Report No. 966, dated August 17, 1961, and Conference Report No. 1161, dated September 11, 1961, 87th Congress, 1st Session.) There can be no inference here that any overt gambling acts upon which the affidavit was allegedly based took place after the interstate travel because at the time of the affidavit the Government was not even aware of the requirement of subsequent overt acts. The original indictment herein did not allege any overt acts, whether prior or subsequent. (See indictment which was dismissed in District Court Cause No. 65 Cr. 191 (1) in Record Volume II.)

E. No complete essential elements.

At the time of the issuance of the search warrant, petitioner was about to be arrested for violation of 18 U. S. C., § 1952. The search warrant, warrant of arrest and complaint specifically referred to this section, but at that time the Government was apparently not aware of what constituted all of the essential elements of the offense under Section 1952. The earlier indictment against petitioner was dismissed by the Government upon petitioner's motion and a new indictment on which petitioner was tried was obtained, because the original indictment omitted one of the basic elements of the offense, to-wit, the commission of an overt act after the alleged interstate travel with the requisite intent. The elements of the offense under Section 1952 are threefold: (1) interstate travel, (2) the requisite intent, and (3) overt acts after travel in furtherance of the unlawful activity. The affidavit of the F. B. I. Agent alleged the travel in inter-

state commerce but there was absolutely no allegation of the commission of an overt act after the travel. Thus, the affidavit was deficient because it failed to include all of the essential elements of the offense. The majority opinion below was silent as to this omission.

F. **No federal offense.**

Because of the failure to allege any overt acts subsequent to the interstate travel, the affidavit did not allege the commission of a federal crime, as required by **Thomas v. United States**, 5 Cir., 376 F. 2d 564. The majority opinion's references to "probable cause to believe the law was being violated" (A. 26, R. IV 10), and to "a sufficiently clear picture of a probable violation of the law" (A. 28, IV 12) could only be to a state law violation, if any. There being no description of the elements of an offense against the laws of the United States, the affidavit was deficient.

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We have not attempted in this brief to repeat all of the arguments and authorities relied upon by Judge Heaney in his dissenting opinion in the Court of Appeals. We believe that the opinion, reported at 382 F. 2d 894 (A. 56, R. IV 42), is an excellent analysis of the applicable law and conclusively shows that the affidavit here was not sufficient to constitute probable cause for the issuance of a search warrant.

II.

The Search Warrant Was Not Executed Forthwith.

Rule 41 (c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall command the officer to search **forthwith** the person or place named for the property specified." The search warrant in this case directed the officer: "You are hereby commanded to

search forthwith the place named for the property specified . . .'' (Emphasis supplied).

The evidence at the hearing on the motion to suppress evidence showed that the officers arrived at the apartment building at approximately 4:55 P. M., concealed themselves in an apartment across the hall, and waited until 7:05 P. M. when petitioner emerged from Apartment F (A. 12-14, R. I 51, 53-54). When asked the reason for waiting two hours and ten minutes, Agent Bender stated: ''Well, we wanted to observe Mr. Spinelli come out of Apartment F, the apartment in question, and consequently this was the only spot that we could utilize under the circumstances, and we did utilize the apartment, and we did see Mr. Spinelli come out of Apartment F'' (A. 14, R. I 54). He acknowledged that no effort was made to enter the premises either by force or invitation (A. 14, R. I 55). This testimony was confirmed by Agent Bradley (R. I 63-64).

The only federal case which we have found on this subject is **Mitchell v. United States**, D. C. Ct. App., 258 F. 2d 435, in which it was held that a search warrant issued five days prior to execution was valid. The majority opinion below cites the Mitchell case as authority that police officers are not invested ''with the discretion to execute the warrant at any time within ten days believed by them to be the most advantageous'' (A. 38, R. IV 22). But the majority opinion does not adhere to the views expressed by Judge Bazelon in the Mitchell case. In his concurring opinion, Judge Bazelon stated (l. c. 438):

> ''. . . (D)elay occasioned merely by the officer's assumption of authority to select the time of execution does vitiate the warrant. Even the magistrate has no right, once he has determined that the conditions for the issuance of a warrant are in existence, to

keep the suspect under surveillance and postpone execution of the warrant until such time as it may do the suspect the greatest harm."

After reviewing a number of state cases, Judge Bazelon concludes that the officer has no discretion to withhold the execution of the search warrant in order to wait for the best time to serve it, and that the warrant must be served as soon as possible after it has been issued.[3]

The majority opinion below refuses to equate "forthwith" with "immediately",[4] and speculates on possible reasons for the delay. But there was no explanation by the officers why they withheld executing the search warrant for two hours and ten minutes. They were at the premises to be searched, they had the search warrant, and they had the authority, if necessary, to break into and enter the premises. See 18 U. S. C., § 3109. That "evidence of gambling might well have been flushed down the commode before the officers could have forced their way into the apartment" would not excuse the giving of notice under § 3109 and is no justification for the delay here. To permit them to delay the execution until such time as they deemed proper gave the officers discretion which the search warrant and the Commissioner did not and could not give them.

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[3] In **Berger v. New York**, 388 U. S. 41, this Court, in discussing the electronic surveillance approved in **Osborn v. United States**, 385 U. S. 323, said at 57: "Moreover, the order was executed by the officer with dispatch, not over a prolonged and extended period." One of the deficiencies in the New York statute disapproved in **Berger** was that "(p)rompt execution is also avoided." At 59. Cf. **Katz v. United States**, 389 U. S. 347 (fn. 20): ". . . the concept of an 'incidental' search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest."

[4] Black's Law Dictionary, Fourth Edition, and Webster's New Collegiate Dictionary both give a first definition of "forthwith" as "immediately."

Perhaps the officers waited in hopes that they might personally hear incriminating conversations or see other persons arriving with other evidence so as to give them the probable cause which they did not previously have. (See Section I of this Argument.) Perhaps they delayed in order to create the issue as to whether petitioner later would have standing to move to suppress the evidence, an issue which swayed the trial Court (A. 16-17, R. I 88) but not the Court of Appeals (A. 24-26, R. IV 7-10). Perhaps they had some other unexplained reason for the delay.

We believe Judge Bazelon was anticipating just such circumstances when he stated in the Mitchell case (l. c. 437):

> "There is danger, especially in cases like the present one where the establishment to be searched is claimed to be a scene of recurring law violations, that the officer . . . may seize property which came into existence after the warrant was issued."

It is true that Rule 41 (d) states that "the warrant may be executed and returned only within ten days after its date." We submit that this does not give discretion to the officer to delay the execution, but merely provides a maximum time during which the warrant retains its validity. There may be numerous reasons why a warrant cannot be executed within the ten-day period and thus becomes invalid. For example, the place to be searched may be mobile and not located by the officer, or an officer may not be readily available, or the warrant may have to be transmitted through the mail, or there may be weather conditions or other elements preventing immediate execution. But there is nothing in the Rule which gives any authority to an officer to delay the execution for no apparent reason once he is at the scene and has every facility available to execute the warrant, including

the right to break and enter. As Judge Bazelon stated in the Mitchell case (l. c. 440):

> "As I read the statute, ten days is the maximum allowable delay, even if circumstances make service impossible, but, if earlier service can be made, it must be made as soon as possible after the warrant has been issued."

The majority opinion below, without the citation of authority, would require the person complaining of the search to "point to some definite legal prejudice attributable to this unjustified delay." We submit that the burden ought not to be on the defendant to prove prejudice resulting from the unexplained delay. To require such of the defendant would create an unreasonable and probably impossible burden. It would open the door to unbridled abuse by officers of the constitutionally controlled area of searches and seizures.

In the related situation where the issue is one of probable cause, this Court has never required that prejudice be shown—only that the defendant have standing to contest the search. **Jones v. United States**, 362 U. S. 257. The burden of proving prejudice is not thrust upon the person objecting to the search where officers have improperly broken doors without giving the notice required by 18 U. S. C., § 3109 of their authority and purpose. **Miller v. United States**, 357 U. S. 301; **Wong Sun v. United States**, 371 U. S. 471; **Sabbath v. United States**, ... U. S. ..., decided June 3, 1968. Why should proof of prejudice be required where the officers enter belatedly and not where they enter prematurely?

An unreasonable search, whether because of the absence of probable cause or because of improprieties in the method of execution, is an important constitutional question. Where a violation of constitutional magnitude oc-

curs, we suggest that it is conclusively prejudicial. See **Davis v. United States**, 8 Cir., 247 F. 394, 398, and **Honig v. United States**, 8 Cir., 208 F. 2d 916, 921. At the very least, the burden should be upon the Government to prove beyond a reasonable doubt that the error was harmless. **Chapman v. California**, 386 U. S. 18, 24.

The search warrant here was not properly executed and the evidence should have been s ppressed. To permit the search and seizure and to admit the evidence under these circumstances subjected petitioner to a search and seizure which was unreasonable and unlawful, in violation of his right to be secure against unreasonable searches and seizures guaranteed by the provisions of the Fourth Amendment to the Constitution of the United States, and in violation of his right not to be deprived of liberty or property without due process of law guaranteed by the provisions of the Fifth Amendment to the Constitution of the United States.

III.

The Officers Seized More Than the Search Warrant Authorized.

Rule 41 (c) of the Federal Rules of Criminal Procedure states that the search warrant "shall command the officer to search . . . for the property specified." The Fourth Amendment, as to search warrants, uses the language: "particularly describing the . . . things to be seized."

The property specified in the search warrant was "bookmaking paraphernalia, scratch sheets, bet tabs, pay and collection sheets, bookmaking records, baseball schedules, books and records of bets received, accounts, bookmaker's ledger sheets, two telephones." Among the items seized, according to the inventory made by the searching officers, were the following: Underwood Adding Machine in brown

case (Pl. Ex. 44, R. III 179, 242), pencil sharpener (Pl. Ex. 50, R. III 180, 242), stack of blank deposit tickets on State Bank of Wellston (not suppressed on motion to suppress but not introduced by government), G. E. AM-FM radio (Pl. Ex. 47, R. III 180, 242), $22.00 in currency (Pl. Ex. 38, R. III 176, 242), a pair of glasses (Pl. Ex. 51, R. III 191, 242), Timex watch (Pl. Ex. 52, R. III 191, 242), pads of graph paper (not suppressed, not introduced), four pens and two pencils (Pl. Ex. 45, R. III 179, 242), lease of premises (Pl. Ex. 46, R. III 179, 242), and five telephones (Pl. Ex. 40, 41, 42, 43, R. III 177, 178, 242).

We submit that these seized items do not fall within any of the categories specified in the search warrant. To characterize them as "bookmaking paraphernalia," as was done by the majority opinion below, gives an unnecessarily broad definition to that vague term, contrary to the command of Rule 41 (c) and the Fourth Amendment. In effect, it gave unlimited authority to the searching officers to seize anything they desired under a general warrant. See **Marron v. United States**, 275 U. S. 192, and **Stanford v. Texas**, 379 U. S. 476. If "bookmaking paraphernalia" can be so broadly construed, then there would be no necessity to specify the other items particularized in the search warrant. Is it not anomalous to describe two telephones in the search warrant and, when the officers seize five, to hold that the additional three are not telephones but "bookmaking paraphernalia"?

Because the seized items were not specified or described in the search warrant, they were improperly seized. They should have been suppressed under the provisions of Rule 41 (e) (3) which provides that a person may move the District Court "to suppress for use as evidence anything so obtained on the ground that . . . (3) the property seized is not that described in the warrant."

CONCLUSION.

For the foregoing reasons, the search and seizure was constitutionally invalid. The District Court should have sustained petitioner's motion to suppress the evidence.

Accordingly, the judgment below should be reversed and the case remanded to the United States District Court for the Eastern District of Missouri, with directions to sustain petitioner's motion to suppress evidence.

Respectfully submitted,

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